

**McLean Trucking Company and William R. Poss  
Teamsters Local Union No. 728 and William R.  
Poss. Cases 10-CA-15804 and 10-CB-3322**

September 15, 1981

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On March 31, 1981, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, the Respondent Union and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

<sup>1</sup> The Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

While we agree with the Administrative Law Judge that the Respondent Union did not violate Sec. 8(b)(1)(A) of the Act by the manner in which it presented Poss' grievance at the arbitration hearing, we do not rely on the Administrative Law Judge's reasoning that the Union's conduct was privileged merely because its representative "did everything Poss' attorney requested him to do at the arbitration proceeding." It is well settled that once a union undertakes to present a grievance to an arbitral forum, its statutory obligation includes the duty to act as an advocate for the grievant. *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974). Therefore, a union may not normally defer to the grievant's private attorney its statutory obligation in this regard merely because the grievant has retained independent counsel in connection with an employment-related matter separate and distinct from the grievance-arbitration process. Accordingly, in the instant proceeding we find that the Union fulfilled its statutory obligation, not on the primary basis of the Union's presentation of documents furnished by the grievant's attorney, as found by the Administrative Law Judge, but rather upon the substantial obstacle faced by the Union at the arbitration which drastically impeded its ability more vigorously to present Poss' grievance, namely, Poss' voluntary absence from the hearing and his consequent failure to testify in support of the grievance. In these circumstances, we cannot conclude that the Union engaged in perfunctory grievance handling in violation of the Act by failing more fully to present evidence at the hearing.

<sup>2</sup> Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

Order of the Administrative Law Judge and hereby orders that the Respondent Employer, McLean Trucking Company, Duluth, Georgia, its officers, agents, successors, and assigns, and the Respondent Union, Teamsters Local Union No. 728, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

**DECISION**

**STATEMENT OF THE CASE**

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on February 2 and 3, 1981, in Atlanta, Georgia. The charges were filed on May 17, 1980. An order consolidating cases and complaint and notice of hearing issued on July 10, 1980. The complaint alleges that Respondent Employer (McLean) engaged in several instances of 8(a)(1) violations and an 8(a)(1) and (3) violation by discharging employee William R. Poss. The complaint also alleges that Respondent Union processed a grievance of employee Poss in a perfunctory manner in violation of Section 8(b)(1)(A) of the Act.

Upon the entire record, my observations of the witnesses and after due consideration of the briefs filed by the General Counsel, Union, and McLean, I hereby make the following:

**Findings<sup>1</sup>**

William Poss was employed at McLean's Duluth, Georgia, terminal from March 1979 to January 1980. The General Counsel alleges that, from fall 1979 until his termination, Poss lodged several complaints with McLean concerning employee working conditions, including complaints regarding the collective-bargaining agreement. The General Counsel also contends that Poss complained about an alternate steward in the Union. In that regard, Poss requested a meeting during working time for the purpose of the employees voting to remove the alternate steward. Poss' request for time to meet was denied by McLean. Allegedly as a result of Poss' complaints, which the General Counsel contends were protected under the Act, Poss was discharged. The General Counsel alleges that the Union violated the Act by handling Poss' discharge grievance in a perfunctory manner.

William Poss was employed as a driver-checker on the night shift. Poss was a member of Local No. 728.

<sup>1</sup> Both Respondents admitted the commerce allegation in the complaint. Upon the basis of those allegations and admissions, I find that Respondent Employer is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Both Respondents also admitted, and I find, that the Respondent Union is and has been at all times material herein a labor organization within the meaning of Sec. 2(5) of the Act.

The complaint also alleges that Respondents were parties to a collective-bargaining agreement. On the basis of the complaint allegations and the answers of Respondents, I find that at times material herein Respondents were parties to a collective-bargaining agreement regarding a unit of employees which included employee William R. Poss.

### A. Background

On a few occasions before November 1979, Poss complained to management about various conditions. One occasion happened around August 1979. According to Poss' testimony, he refused to drive a truck. Poss checked the load and found the load was so heavy that one side of the truck was touching the wheels. Poss complained that he would not pull the load because it was unsafe. Tom Clelland testified that he was the evening dispatcher in August 1979,<sup>2</sup> and that on one occasion in August 1979 Poss refused to drive a truck on the assertion that the truck was unsafe. Clelland admitted that there was a lot of weight on the truck or it had bad springs, with the result that it "looked like it was real close to the tires."

In consideration of the discharge allegation, I note that Poss' refusal to drive an overloaded truck constitutes protected concerted activity. The collective-bargaining agreement which existed between the Respondents at that time included, *inter alia*, the following: "The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition, including but not limited to acknowledged overweight . . . ."

"When an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract." *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975); *T & T Industries, Inc.*, 235 NLRB 517 (1978); cf. *Pink Moody, Inc.*, 237 NLRB 39 (1978).

In September, according to Poss' testimony, he had a dispute with Tom Clelland over his timecard. Poss testified that he experienced mechanical problems on his truck resulting in his returning late to the terminal. When he arrived, Clelland had already punched him out on the timeclock. Poss protested to both Clelland and Terminal Manager Gregory Raines that he had been improperly denied time. According to Poss, Raines agreed to remedy Poss' complaint; however, Raines asked Poss not to tell anyone that Poss was being paid for the extra time. Poss told Raines "that's not right. . . . Ya'll've been doing it to the other employees out there it just not right." Poss testified that despite Raines' request, he immediately told three or four employees about the incident. As shown below, I credit Poss' testimony. I find that his complaint flowing from Raines' direction not to tell other employees constitutes protected concerted activity. "[A]n individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees." *Air Surrey Corporation*, 229 NLRB 1064 (1977).

Following the above occurrences, an incident arose involving alternate steward James "Butch" Bullock. Around the first of October, Poss was told by Bullock

that Bullock would not claim overtime because the overtime situation occurred because Bullock permitted his truck to run out of fuel. Poss argued with Bullock that Bullock's failure to claim overtime deprived other employees the opportunity to work that time. Poss filed a grievance over Bullock's failure to claim the overtime.

Poss testified that 2 or 3 days after he filed the grievance, dispatcher Jerry Keller<sup>3</sup> told him to go into one of the offices and that he (Keller) would be there shortly. When Poss entered the office, there were some six to eight employees present, including Bullock and steward Clayton Milliken. Milliken had a grievance in his hand. Milliken asked Poss, "Are you going to push this grievance against Butch?" Poss replied that yes he was. Another employee, Dave Willaugby, told Poss "he would take me out in the parking lot and whup me if I kept pushing it."

At a later date Poss asked Clayton Milliken about the grievance. Milliken apologized for the incident in the office. However, Poss testified that he never heard that any action would be taken on this grievance.

### B. The Alleged 8(a)(1) Violations

#### 1. The forklift incidents

In early November, according to the testimony of Poss, he complained to dispatcher Ray Dean because he had noticed an "extra man" operating the forklift. Poss told Dean that the forklift job was a "union job" and it should be operated by a senior man. According to Poss, Dean replied that he would run the dock like he wanted to. To that, Poss stated that he would have to file a grievance.

On the following morning he called Union Assistant Business Agent Wayne Shepherd about the forklift incident. Shepherd told Poss that he would call McLean's general manager, Rittenburg, about the matter.

When Poss reported to work that evening, he was called into Terminal Manager Gregory Raines' office. Poss testified that Raines told him "he was causing trouble and [Raines] was gonna get my job if I didn't quit." Poss replied, "I have the right, you know, if I see anybody's rights being abused, I have a right to tell them . . . whether they do anything, that's their business." Raines stated, "You're gonna have to stop it."

Poss testified that after leaving Raines' office he clocked in and Ray Dean was standing at the timeclock. Dean told him, "You've made 'em mad in the office, Billy." Poss asked what Dean meant and Dean replied, "Well, I hear you called Wayne Shepherd and he called Rittenburg and he called Greg and now Greg—he got all over Greg—and now Greg is getting over me about your calling down there . . . you've made them mad, they're gonna get you." Poss asked Dean if Dean was threatening his job. Dean replied, "No, not me. . . . Just take it easy and be careful."

In January 1980 employee Willie Benton complained to Poss that Ray Dean would not let Benton drive the forklift even though Benton was the senior man on the

<sup>2</sup> Clelland was not alleged to be a supervisor. However, Clelland was called by McLean. In response to questions from McLean's attorney, Clelland testified that William Poss worked under his supervisory control.

<sup>3</sup> As indicated in fn. 2, *supra*, the evidence demonstrated that dispatchers exercised supervisory authority.

dock. As Poss and Dean were talking, Dean walked up. Poss told Dean that it "seems like we're having a problem about this lift again, Ray." Dean replied that he would run the dock like he wanted to. The following day Raines called Poss into his office and asked Poss about the problem with Benton. Raines then told Poss that he did not have the right to be telling employees their rights. Raines admitted instructing Poss that he did not have the authority to instruct employees on their union rights during their shift.

The collective-bargaining agreement and its incorporated supplemental agreement provide for the consideration of seniority in, among other things, the "bulletining of jobs." No effort was made to show that Poss' complaint about the forklift job did not fall within the scope of those provisions. "It is well established that efforts to enforce the provisions of an existing collective-bargaining agreement, even if made by a single employee, constitute concerted activities protected by Section 7 of the Act." (*Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966).) As shown below, I credit Poss' testimony. I find that Raines' comments and threat violate Section 8(a)(1). (*Interboro Contractors, supra.*)

## 2. Raines' phone calls

Poss testified that in early December 1979 two fellow employees told him they had received phone calls from Terminal Manager Raines. Employee Randy Leazer told Poss that Raines wanted to know why he always went to Poss with his problems. Leazer told Raines that Poss had been around longer and that, if Poss did not know what was right, he would call the union hall and ask. Leazer said that he told Raines that that was more than anyone else would do for them. Poss testified that later employee Danny Rogers came to him and told him the same thing as Leazer.

Gregory Raines admitted calling a number of night-shift employees in November or December when he observed what seemed to be "a division" among the employees, with some of the employees being loyal to Poss and some loyal to alternate steward Bullock. Raines admitted that Randy Leazer was one of the employees he called. Raines admitted telling the employees not to go to Poss, but, if they wanted their problems solved, they should come to either Raines or their steward.<sup>4</sup>

Although Poss' testimony regarding Raines' phone calls was of a hearsay nature, I have decided to credit what he was told by Randy Leazer, in view of Raines' admissions. Moreover, there was no objection to the receipt of Poss' above-mentioned testimony. Leazer's comments demonstrated that Poss was assisting the employees in their relationship with the Union. Also, Raines admitted that his calls to employees arose out of difficulties between Poss and the alternate steward. Therefore, the evidence shows that the calls were precipitated by con-

certed activities and union activities of Poss and other employees. Raines, by questioning Leazer as to why he went to Poss, was engaging in illegal interrogation into those activities in violation of Section 8(a)(1). By directing the employees not to go to Poss, McLean, through Raines, engaged in further 8(a)(1) activity by interfering with its employees' Section 7 rights.

## 3. The "extra" employee incident

During November or December another incident arose when an "extra" employee left early and told Poss and several other employees that he would be paid for time not worked. The employee said that he had worked an hour overtime the night before without pay and the Company was now compensating him by letting him off early. Poss asked alternate steward Bullock, who was among the employees present, what he thought. Bullock replied that he did not care, that he "wasn't getting into no trouble." Subsequently, Poss and employee Danny Stephens complained to the dispatcher, Ray Dean. Although Dean originally indicated he planned to grant the time, he subsequently agreed that he would not give the "extra employee" time which he did not actually work. As indicated above, activity in furtherance of the collective-bargaining agreement is protected concerted activity. (*Interboro Contractors, Inc., supra.*)

## 4. The quest to remove Bullock

Poss subsequently tried to have Bullock removed as alternate steward. Around the first of January 1980, Poss sought to hold a meeting with employees for the purpose of voting to remove Bullock. Poss asked dispatcher Ray Dean if the employees could have a meeting to handle some union business. Since the collective-bargaining agreement states that a steward has to ask for a meeting, Poss asked Bullock to call the meeting. Bullock asked him why and Poss told Bullock that he was going to seek Bullock's removal. Bullock indicated that he would not ask for a meeting. Poss then asked Dean for a meeting. Dean looked at Bullock and asked if Bullock was asking for the meeting. Bullock said no. Dean then told Poss that he could not have the meeting. Poss asked if he could take an early break and have the meeting with the rest of the men on their lunch period. Dean again said no. Poss then asked if he could wait and punch in 30 minutes late. Dean said, "No, you just cannot have the meeting."

Dean admitted that Poss had asked that he be allowed 15 minutes to hold a meeting with the employees on the dock. Dean testified that he told Poss that he did not think it would be appropriate but that he would check into the matter. Dean testified that he checked the contract and called the operations manager at the Atlanta terminal and discovered that "any meeting by Mr. Poss would be an illegal work stoppage. [Poss] had no authority to call such a meeting."

Poss testified that on the day after he asked to be permitted to hold the meeting, he met Plant Manager Raines in the hallway when he came in to pick up his check. Raines looked at him, laughed, and said, "I've got you now." Poss asked Raines what he was talking about.

<sup>4</sup> Originally under questions from counsel for the General Counsel, Raines admitted telling the employees: "I told them [that] he's not—they were not going to get a problem solved by Mr. Poss—to not to go to him." Later, when Raines was recalled by McLean's attorney, Raines denied that he instructed the employees not to talk to Poss about their problems. I credit Raines' admission that he did tell the employees not to go to Poss.

Raines replied, "You call that unauthorized meeting last night." Raines directed Poss to come into his office. Poss asked if it concerned his job. When Raines indicated that it did, Poss asked for union representation. Pursuant to Poss' request, a meeting was subsequently held in the presence of steward Zeno Douglas and alternate steward Dale Venters. According to Poss' testimony, at the beginning of the meeting Raines laughed again and repeated, "Well, I've got you." Poss mentioned that he did not know what the trouble was; he had just asked for a meeting. Poss testified that Raines asked, "What did you want the meeting for?" Poss replied that it concerned union business and that, since Raines was a part of management, it had nothing to do with him. According to Poss, Raines then asked Dale Venters if he knew what the meeting was about and Venters replied that he did not know. Poss testified that Raines told him that he had been there a "bunch of times which most of the times you have been right, but you are wrong on this one." Poss stated, "Well, I still can't see the point. I said I just asked for it, I didn't get it." According to Poss, Raines then said, "This habit of yours calling the union is going to stop . . . if you want to go by this union contract, . . . I can go by it . . ." Poss replied, "That's what they made it for [they] way I understood it." Raines then stated, "Well, me and Mr. Venters has sat down and made concessions to it." Poss asked what kind of concessions. Raines replied, "Things concerning this lift." Poss complained that it was not fair to permit extra men to bid on the forklift job since most of those people have extra jobs to go to. Other working conditions, including the lunch periods, were also discussed.

Poss testified that Raines asked him why he always called the union hall. Poss replied that nobody around there knew what the rules were. According to Poss, Raines told him he was going to have to stop it. Poss replied that he would call down there anytime he wanted to. Poss testified that Raines replied, "Well . . . I can't handle Wayne Shepherd, but McLean have people that can."

According to Poss, Raines asked him again if he would tell him what the meeting was about and Poss replied no. Raines then suggested to Douglas that they have a meeting to see what the problems were. Poss testified that he asked if he could come to the meeting and Raines originally said that he could not. Poss complained that that was not fair, and Raines stated that Poss could come if he would follow Raines' instructions. Raines stated that he wanted Dale Venters to take notes and that if Poss brought up any of the comments made during the meeting there with Raines, that he, Raines, wanted the meeting stopped.

Poss testified that Raines stated during the meeting that he was going to fire Poss and everybody on the night shift if Poss did not quit causing trouble.

Gregory Raines admitted that he had called Poss into his office subsequent to Poss asking for a meeting and that Poss asked to have a steward present. Raines testified, "Basically, I wanted to know why he wanted to stop the shift and hold a meeting." Raines testified that Poss was very vague and did not want to discuss his request for a meeting. Raines said that he let Poss know

that he was not authorized to hold a meeting, "that we would consider that an illegal work stoppage." Raines admitted that during that meeting Poss brought up several things he seemed to be dissatisfied with, including the lunch hours and the lift job. As to the other factors included in Poss' testimony, Raines denied their occurrence. Raines denied that he told Poss that the practice of calling the union hall would have to stop. Raines denied telling Poss that he and the union stewards had worked out everything and that Poss would have to go along with the program. Raines denied that he told Poss that Poss was not the union steward. Raines denied that he threatened to fire Poss or that he told Poss that he could not attend a union meeting called by Zeno Douglas. Raines also denied telling Poss that he could attend a union meeting only if he did not discuss matters which were raised during his meeting with Poss. Raines denied telling Dale Venters to write down everything that was said in the union meeting or to terminate the meeting if William Poss spoke up.

Raines did admit that he made a statement to Poss that during the shift Poss was not the steward and the employees should go to the union steward if they had problems.

#### Discussion

Venters denied Raines told him to take notes at the union meeting or that Raines told him to terminate the meeting if Poss spoke out. Zeno Douglas also testified briefly about the meeting with Raines. Douglas denied that Raines told Venters to take notes in the union meeting.

I found William Poss' testimony to be credible. I observed his demeanor. He impressed me as a straightforward witness. I also observed the demeanor of Venters, Douglas, and Raines. I found that both Venters and Douglas appeared anxious to identify Poss in a bad light. Although Douglas worked the day shift and had no opportunity to observe the conflicts between Poss and alternate steward Bullock on the night shift, he volunteered that Poss had "ragged" Bullock. Douglas also testified that Poss was wrong to ask for a meeting of night-shift employees.

On the basis of his demeanor and testimony, I find Raines to be less than completely believable. I found portions of Raines' testimony disturbing. At various times Raines categorized Poss' complaints as typical of employee complaints in general. In response to a question of whether Poss figured prominently in a division among the night-shift employees, Raines testified that Poss "was part of it." When asked if Poss had come to him on other occasions with complaints, Raines responded, "As well as other employees." It is obvious that Raines' testimony in that regard unduly suppressed the fact. The record as a whole, including other comments by Raines and testimony of other witnesses produced by both Respondents, demonstrates that Poss was the acknowledged leader in efforts to correct alleged shortcomings on the night shift. Also, as shown above in footnote 4, there were direct conflicts in Raines' testimony.

Therefore, I do not credit Raines' testimony to the extent it conflicts with other evidence.

#### Findings

On the basis of credited evidence, I find that Raines told Poss "I've got you" in regard to Poss' request to hold a meeting of the night-shift employees to discuss union business. Raines interrogated Poss, Venters, and Douglas as to why Poss wanted a meeting. Raines interrogated Poss as to why Poss always called the Union. Raines told Poss that his practice of calling the Union would have to stop. Raines implied that he and the union stewards had compromised several items in the collective-bargaining agreement. Raines told Poss that he could attend an employee meeting provided he limited his activity. Raines threatened to discharge Poss and the night-shift employees if Poss did not stop causing trouble. I find that by engaging in the above-mentioned activities, Respondent Employer through the actions of its agent Gregory Raines engaged in coercive activities in violation of Section 8(a)(1). The fact that Poss was not entitled to a meeting under the terms of the contract does not remove his actions from the Act's protection. There was no showing that McLean was prohibited from granting Poss' request for a meeting and there was no showing that, by requesting a meeting, Poss was engaged in improper conduct. I do not imply that McLean was obligated to grant Poss' request or that, by denying the request, McLean was acting improperly. However, the facts indicate that McLean went further and took action against Poss because he asked for a meeting. The Board has established that the protection accorded employees' concerted activities—and I find that Poss' request for a meeting of employees under the circumstances herein constitutes an effort to engage in both concerted and union activities—does not depend upon the merit or lack of merit of those activities. *Hintze Contracting Company*, 236 NLRB 45, 48 (1978).

#### 5. Interrogation allegation

Following the above-mentioned meeting in Gregory Raines' office, Poss had a discussion with Zeno Douglas and Dale Venters. According to Poss' testimony, Venters mentioned to Poss that he did not have to take all that from Gregory Raines. Poss asked Venters and Douglas why they did not say something. Douglas replied, "Well . . . if I had said anything . . . he would get my job, too." Poss then stated, "Well, that's why you are supposed to be here for." Poss testified that he told Venters and Douglas that he wanted to have a union meeting that evening to get rid of alternate steward James "Butch" Bullock.

A meeting was held among employees that evening. Employees expressed their opinions regarding several of the issues which had arisen among the night-shift employees, including driving the forklift, swapping time, and other matters. According to the testimony of Poss, at the close of the meeting he asked alternate steward Bullock if he was going to resign. Bullock replied, "Yes, I quit." However, Poss testified that during a conversation on January 17 or 18, with Union Assistant Business

Agent Wayne Shepherd, he asked Shepherd if Bullock had ever quit. Shepherd stated, "No, Butch didn't quit. We are not going to let him quit."

On the day following the employees' meeting, Poss met Gregory Raines in the hall at the terminal. According to Poss, Raines stated, "I heard you was going to be a union steward." Poss testified that he replied, "I can't be one. I don't work the right shift." Raines denied making this statement to Poss. However, for the reasons mentioned above, I credit Poss. Raines' comment constitutes interrogation in violation of Section 8(a)(1).

#### C. The Discharge

On January 15, Poss injured his back at work while unloading a truck. Poss testified that he thought he had only pulled a muscle or "strained something." He told dispatcher Ray Dean that his back hurt but he thought he could continue working. However, about 2 hours later Poss found the pain was too much. He told Dean that he would have to go home. Dean permitted him to go home. Poss left some 4-1/2 hours before the end of his shift.

Poss did return to work the following evening. Poss testified that Tom Clelland asked him about his back and Poss told Clelland that it was not hurting too bad right then. Clelland told Poss that he would have to indicate on the previous night's timecard that he left sick or else he will not be permitted to return to work. Clelland told Poss that, if his back got any worse, he would have to fill out some papers. Poss testified that he then told Ray Dean that his back was hurting somewhat and he did not want to work overtime. Poss continued working throughout the shift. Around 5 or 6 a.m. dispatcher Jerry Keller came in at the beginning of his shift and the end of Dean's.

Former employee Danny Stephens testified that he worked with William Poss on January 16. Stephens corroborated Poss' testimony that Poss told Ray Dean that he did not want to work overtime. According to Stephens' testimony, three employees, including Poss, Marvin Rhinehart, and Stephens, told Dean that they did not want to work overtime. Stephens stated that throughout the shift on January 16 he observed Poss and it was his opinion that Poss had a hurt back. Stephens testified that around 7 a.m. Jerry Keller came by the trailer where Stephens and Poss were working and told them that they were going to have to work overtime. Around 8 a.m. Poss told Jerry Keller that he just could not work anymore and that his back was hurting. Stephens said that Keller told him, "I want you to witness this." Keller then said that he needed both Stephens and Poss to work overtime. Stephens told him that it was all right with him since he had to wait in any event because the fellow he rode home with had taken a trip to Atlanta and had not returned at that time. However, Stephens testified that Poss told Keller "that his back was hurting him previously from the night before and he had already worked his eight hour shift and he just absolutely didn't feel like it." Keller told Poss that he needed him to work. Poss then asked Keller if he was going to make

him work and Keller just shrugged his shoulders and pointed to the timeclock.

Jerry Keller's testimony was in substantial accord with that of Danny Stephens. However, according to Keller's testimony, Poss said nothing about his back hurting until after he had punched out on the timeclock. According to Keller, Poss did protest working overtime, but it was not until the conclusion of their discussion of working overtime after Poss punched the timeclock, and as he was walking by Keller, that he mentioned that he had hurt his back.

#### Findings

There appears to be no question that Poss suffered a painful injury to his back on January 15. Medical records demonstrate the results of a myelogram showing "a large ventral extradural defect at the L5-S1 level extending bilaterally inducing impingement on the nerve roots emanating at this level bilaterally." The medical report concludes "large herniated nucleus pulposus at the L5-S1 level extending bilaterally." No evidence was offered to show that Respondent Employer had any grounds to doubt Poss' injury. Poss was permitted to leave early on January 15 when he complained of pain.

As to the incidents on January 16, I fully credit the testimony of Danny Stephens. Stephens impressed me as candid. Stephens was not personally involved in the controversy. I credit Stephens' testimony that Poss told Keller that he was in too much pain to keep working on the morning of January 16.<sup>5</sup>

On the basis of Stephens' testimony and the testimony of Poss, I am convinced that Poss did not quit. I find that Poss told Dean at the beginning of the shift that he did not want to work overtime. I find that Poss told both Dean and Clelland that he had hurt his back on January 15; and, although his back was bothering him when he reported to work on January 16, it was not too painful at that time. The credited evidence as a whole convinces me that Poss was discharged on January 16 and that McLean's asserted basis for terminating Poss was pretextual.

According to McLean, Poss left them shorthanded when he declined overtime on January 16. However, it is apparent from the actions of Keller that nothing was done to correct the problem. Rather than taking steps to replace Poss on the overtime work, Keller immediately commenced building a case against Poss. He asked Danny Stephens to witness that Poss was refusing overtime. He asked Stephens to fill out a report of Poss' refusal. Keller then called Dean, getting Dean out of bed, in an effort to establish that Poss had not told Dean that he did not want overtime work.

I also find that McLean treated Poss in a disparate manner. Employees, including both Poss and Danny Stephens, were permitted to leave work without being disci-

plined. On the evening before his discharge, Poss was permitted to leave because of his back injury. I credit Danny Stephens' testimony that on one occasion he was permitted to leave to go deer hunting even though Jerry Keller had directed him to work overtime. No evidence was offered showing that employees were ever denied requests to leave work because of an injury.

On the basis of the above facts, the entire record, and other elements, including timing, I find that McLean discharged William Poss on January 16 because of Poss' complaints about conditions covered by the collective-bargaining agreement and other protected concerted activities (see above). (*Penn Industries, Inc.*, 233 NLRB 928 (1977); *Newport News Shipbuilding and Drydock Company*, 233 NLRB 1443 (1977).) McLean thereby violated Section 8(a)(1) and (3) of the Act.

#### D. The Alleged 8(b)(1)(A) Violations

##### 1. The alleged threat

The General Counsel alleges that the Union through steward Zeno Douglas<sup>6</sup> threatened employees with reprisals if they filed grievances. William Poss testified that he left a note for Zeno Douglas pertaining to the incident of Dean giving unearned time to an extra employee (see sec. B, 3, *supra*). Douglas worked on the day shift. Poss said that Douglas called him the next day and that he explained the situation to Douglas. Poss told Douglas that the alternate steward was aware of the incident but did nothing. Poss testified that Douglas told him that he would talk to the alternate steward. According to Poss, Douglas then said, "Billy, you're in so much trouble in this office. I wouldn't advise that you file a grievance on this." Poss remarked, "Well, it's a poor thing a man comes in here to do his work, he's got to watch the dock foreman punching people's timecards." Douglas then said, "Well, you do what you want to but . . . I wouldn't file a grievance on it." As indicated above, I credit the testimony of Poss over that of Douglas. In the context of Poss' complaint regarding the inaction of the alternate steward as well as McLean's practice, I find in agreement with the General Counsel. Douglas' statements to Poss reasonably implied that reprisals may be forthcoming because, among other things, Douglas was complaining about the Union's alternate steward. I am also concerned that this conversation between Poss and Douglas followed Poss' grievance in October against alternate steward Bullock because Bullock failed to claim overtime. On that occasion Poss was confronted with steward Clayton Milliken and a group of employees regarding Poss' grievance. During that confrontation one of the employees threatened to fight Poss (see sec. A, *supra*). Therefore, I find Douglas threatened Poss in violation of Section 8(b)(1)(A). (*Peninsula Shipbuilders' Asso-*

<sup>5</sup> To the extent their testimony conflicts with the testimony of Stephens or Poss, I do not credit Clelland, Dean, or Keller. I base my determination on the record and on my observation of the witnesses' demeanor. I specifically credit Stephens' account of the conversation between Poss and Keller around 8 a.m. when Poss protested against working overtime. I also specifically credit Stephens' and Poss' testimony that Poss told Dean that he did not want to work overtime on that shift.

<sup>6</sup> The Union admitted that Douglas was its steward. However, the Union did not admit that Douglas was its agent. The record clearly proved that Douglas possessed and exercised authority of a steward and was an agent of the Union. In that regard, the parties stipulated that the steward was authorized to investigate and present grievances to the Employer, to collect dues when authorized by the Local, and to transmit messages and information which originate with and are authorized by the Local.

ciation (*Newport News Shipbuilding*), 237 NLRB 1501 (1978); *Local 14997, United Steelworkers of America (La-Porte Plastics Corp.)*, 244 NLRB 492 (1979).)

## 2. Poss' grievance

The General Counsel also alleges that the Union engaged in violative conduct by processing Poss' grievances over his January 16 discharge in a perfunctory manner. In that regard, I find the record fails to establish the General Counsel's case. The General Counsel rests its allegation primarily on the Union's failure to call Danny Stephens as a witness during a March arbitration hearing.

To the time of the arbitration hearing, there appears to be no controversy. Poss grieved over his discharge and the Union processed his grievance to arbitration. Moreover, the evidence is clear that the arbitration proceeding was held in Biloxi, Mississippi, in March and that neither Poss nor Danny Stephens was present.

Poss testified that he informed his attorney, whom he retained to pursue his workmen's compensation claim, that he could not be available at the March arbitration meeting because his doctor would not let him travel.<sup>7</sup> The next thing Poss heard about his arbitration was during April when he was informed by the Union that the arbitration proceeding had been held in March and that Poss had lost.

Neither of Poss' two attorneys testified in support of his position. Wayne Shepherd, assistant business agent, was called by the Union. Shepherd testified without rebuttal that he was contacted on March 14 by an attorney named Robinson. Robinson indicated that he represented William Poss. The attorney told Shepherd that he had some statements and some medical papers that he would like to send to Shepherd to be presented in evidence at the arbitration proceeding. Shepherd testified that he received the documents sent by Robinson and that he submitted all those documents into evidence during the arbitration proceeding.

There is no evidence in the record that the Union was requested to postpone the March arbitration proceeding, although Poss asked his attorney to seek a postponement. The un rebutted testimony of Wayne Shepherd shows that request was not communicated to the Union. Therefore, I find the Union did nothing wrong in not asking for a postponement.

It would appear that the most diligent pursuit of Poss' grievance would include a thorough investigation and the presentation of the results of that investigation, which would involve calling as witnesses or presenting affidavits or depositions from Poss and Stephens. However, in view of the un rebutted testimony of Shepherd that he did everything Poss' attorney requested him to do at the arbitration proceeding, I find no justification that the Union acted improperly. The record did not demonstrate that Shepherd was not reasonably justified in presuming that Poss' attorney had fully investigated

the matter and was presenting his findings for inclusion in the arbitration record. Despite evidence of hostility toward Poss, the record does not demonstrate that the Union acted perfunctorily. The Union did process the discharge grievance to arbitration and Shepherd presented everything sent by Poss' attorney. (Cf. *Eldorado Manufacturing Corporation*, 249 NLRB 646 (1980), and *Newport News Shipbuilding & Dry Dock*, 236 NLRB 1470 (1978), where there existed strong evidence in support of the allegations.)

## CONCLUSIONS OF LAW

1. McLean Trucking Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent McLean, by prohibiting its employees from discussing terms and conditions of employment with other employees; by prohibiting its employees from engaging in protected concerted activities or union activities; by interrogating its employees concerning discussions they had with other employees concerning their rights under the collective-bargaining agreement; by threatening its employees with discharge and other unspecified reprisals if they discussed employee grievances, working conditions, and rights under the collective-bargaining agreement with other employees; by prohibiting its employees from contacting the Union regarding grievances over working conditions; by threatening its employees with more stringent enforcement of provisions of the collective-bargaining agreement if its employees engaged in protected concerted activities; by instructing its employees to take notes in a union meeting; and by interrogating its employees as to why they discussed their grievances over working conditions with a fellow employee, violated Section 8(a)(1) of the Act.

4. Respondent McLean, by discharging its employee William R. Poss on or about January 16, 1980, and thereafter failing and refusing and continuing to fail and refuse to reinstate Poss because of his concerted activities and union activities, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. Respondent Union, by threatening union members and employees with unspecified reprisals if Poss filed a grievance under the collective-bargaining agreement because of his complaint about an alternate steward of the Union, violated Section 8(b)(1)(A) of the Act.

6. Respondent Union did not violate Section 8(b)(1)(A) of the Act by processing a grievance in a perfunctory manner.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondents have engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

<sup>7</sup> Poss' attorney had previously requested an arbitration hearing set in February be postponed because Poss was entering the hospital. That hearing was postponed. Poss testified that when he received notice of the March hearing, he had just been released from the hospital and his doctor forbade him to travel to Biloxi.

As I have found that Respondent McLean unlawfully discharged William R. Poss, I shall recommend that Respondent McLean be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent McLean be ordered to make William R. Poss whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay shall be computed as shown in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as shown in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>8</sup>

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>9</sup>

The Respondent, McLean Trucking Company, Duluth, Georgia, its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Prohibiting its employees from discussing terms and conditions of employment with other employees; prohibiting its employees from engaging in protected concerted activities or union activities; interrogating its employees concerning discussions they had with other employees concerning their rights under the collective-bargaining agreement; threatening its employees with discharge and other unspecified reprisals if they discuss employee grievances, working conditions and rights under the collective-bargaining agreement with other employees; prohibiting its employees from contacting the Union regarding grievances over working conditions; threatening its employees with more stringent enforcement of provisions in the collective-bargaining agreement if its employees engaged in protected concerted activities; instructing its employees to take notes in a union meeting; and interrogating its employees as to why they discuss their grievances over working conditions with a fellow employee.

(b) Discharging and thereafter failing and refusing to reinstate its employees because of its employees' concerted activities and union activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, or to refrain from any and all such activities, or to engage in protected concerted activities.

##### 2. Take the following affirmative action designed and found necessary in order to effectuate the policies of the Act:

(a) Offer William R. Poss immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to

his seniority or other rights and privileges, and make Poss whole for any loss of earnings he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its facility in Duluth, Georgia, copies of the attached notice marked "Appendix A."<sup>10</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative of Respondent McLean, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent McLean to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent McLean has taken to comply herewith.

B. The Respondent, Teamsters Local Union No. 728, its officers, agents, and representatives, shall:

##### 1. Cease and desist from:

(a) Threatening its members and employees with unspecified reprisals if employees file grievances under the collective-bargaining agreement because its members and employees complain about the Union's alternate union steward.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

##### 2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Post at its union hall copies of the attached notice marked "Appendix B."<sup>11</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative of Respondent Union, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

<sup>8</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>9</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>10</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>11</sup> See fn. 10, *supra*.



## APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT prohibit our employees from discussing terms and conditions of employment with other employees.

WE WILL NOT prohibit our employees from engaging in protected concerted activities or union activities.

WE WILL NOT interrogate our employees concerning discussions they had with other employees concerning their rights under the collective-bargaining agreement.

WE WILL NOT threaten our employees with discharge and other unspecified reprisals if they discuss employee grievances, working conditions, and rights under the collective-bargaining agreement with other employees.

WE WILL NOT prohibit our employees from contacting the Union regarding grievances over working conditions.

WE WILL NOT threaten our employees with more stringent enforcement of the provisions in the collective-bargaining agreement if our employees engage in protected concerted activities.

WE WILL NOT instruct our employees to take notes in a union meeting.

WE WILL NOT interrogate our employees as to why they discuss their grievances over working conditions with a fellow employee.

WE WILL NOT discharge or fail to reinstate our employees because of their union activities or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer William R. Poss immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make William R. Poss whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

MCLEAN TRUCKING COMPANY

## APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT threaten members or employees with unspecified reprisals because those members or employees filed grievances under the collective-bargaining agreement because a member or employee complains about our alternate union steward.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce members or employees in the exercise of their rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

TEAMSTERS LOCAL UNION No. 728